DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Hannahville Indian Community v. Bureau of Indian Affairs

Docket No. IBIA 97-143-A (04/23/1999)

Related Indian Self-Determination Act case:

Interior Board of Indian Appeals decision, 34 IBIA 4
Interior Board of Indian Appeals decision, 34 IBIA 252
Interior Board of Indian Appeals decision, 37 IBIA 35

United States Department of the Interior

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April 23, 1999

HANNAHVILLE INDIAN COMMUNITY Appellant,	)	Docket No. IBIA 97-143-A
v.	)	**RECOMMENDED DECISION**
BUREAU OF INDIAN AFFAIRS Appellee.	)	

1. This matter arises out of an "Application for Lease Regarding the Hannahville Indian School" (hereafter the "application for lease" or" application"), initiated by the Appellant, Hannahville Indian Community of Michigan, dated September 11, 1996; and a letter from the Appellee, Minneapolis Area Office, Bureau of Indian Affairs, constituting a final agency decision (hereafter the "decision") declining said Application dated April 7, 1997. The Appellant filed a timely "Notice of Appeal ... and Request for Hearing on the Record" to the Department of the Interior Board of Indian Appeals (IBIA). On July 16, 1997, an "Order Referring Appeal to the Hearings Divisionfor Assignment to an Administrative Law Judge" was issued by the Chief Administrative Judge, IBIA. The matter was initially assigned to Administrative Law Judge Vernon J. Rausch, who has subsequently retired. The undersigned has succeeded to Judge Rausch's pending cases.

2. No evidentiary hearing was held in this matter during Judge Rausch's tenure. In response to my "Notice of Assignment and Prehearing Order" dated April 29, 1998, it was stipulated by the Appellant's and Appellee's attorneys that no evidentiary hearing was necessary and was waived, and that the matter could be decided upon (1) a Joint Stipulation of Facts, (2) the Administrative Record submitted, and (3) the briefs and accompanying documentary filings of the parties and their attorneys (the three collectively constituting "the record").

3. Although no evidentiary hearing under the Administrative Procedures Act was held in this matter, and has now been waived, jurisdiction nevertheless remains in the Hearings Division because an APA hearing was initially requested. But this situation contrasts with the normal circumstance in which spoken testimony is taken on the record before an Administrative Law Judge (ALJ), and witness demeanor is noted and credibility assessed. In the present case this ALJ is in no better position to decide the case, consisting solely of a documentary record, than would be the Interior Board of Indian Appeals itself in a case originally initiating before it. Accordingly, it follows that the normal deference given by an appellate reviewer to the original trier of fact need not apply in this case.

Recommended Decision

4. After careful consideration of the entire record, this Appeal is DENIED, due solely to the lack of a legally sufficient tribal resolution as a statutorily necessary antecedent part of the Appellant's application for lease at any time while the application was under Secretarial consideration.

5. The application was intended to be a "proposal for a self-determination contract", 25 U.S.C. 450f(a)(2), under the Indian Self-Determination and Educational Assistance Act (1975), Public Law 93-638, as amended, now codified at 25 U.S.C. 450-458hh ("ISDEA"). The statutory requirement for a tribal resolution as part of such a proposal is found in 25 U.S.C. 450f(a)(1) which states, "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contract with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs ..." Without a tribal resolution, there is no "proposal" initiating required Secretarial action under the Act.

6. The Appellant's application for lease contains no resolution. Its transmittal letter to the Assistant Secretary of Indian Affairs, dated 9/11/96, is signed by the Tribal Chairman under the authority line "On Behalf of the Hannahville Indian Community Tribal Council" (which ISDEA refers to as a "tribal organization"). However the transmittal letter and the balance of the application does not indicate any official action was taken by the Council that amounts to a "tribal resolution" within 25 C.F.R. 450f(a)(1). There is no evidence in the record considered that the tribal organization took up as an agenda item of its official business the submitting of this proposal for a self-determination contract, considered and voted thereon at an appropriate Council meeting, and spread such action on the minutes of its meeting, until it did so on March 3, 1997 as discussed below. While Appellant's attorney advocates that the Tribal Chairman's cover letter of 9/11/96 is a resolution and that it should not be excluded for being in an improper form, the evidence of record does not indicate any actions taken by the tribal organization before March 3, 1997 comprising or tantamount to a governmental resolution action which would support that asserted position and would serve to make the Tribal Chairman's cover letter evidence of a legally sufficient underlying resolution action by the tribal organization. The lack here of a cognizable resolution before March 3, 1997, is a matter of substance at the statute level rather than a matter merely of form.

7. An appropriate resolution was duly adopted by the "Executive Council of the Hannahville Community", on March 3, 1997. It is part of the record. But there is no evidence in the record that this resolution was ever transmitted to the Appellee prior to the issuance of the Agency's decision on April 7, 1997, so as to become a supplemental part of the application for lease, fulfilling the statutory requirement. There is reference in Appellant's attorney's Notice of Appeal brief, at page 4, of transmittal "to the Area Office before the letter of declination was issued on 4 April 1997," but no other evidence in the record of this event upon which that assertion can be based. Accordingly, I find as stated in paragraph 4, above.

8. Regardless of whether the application is measured (1) as of September 11, 1996, when it was presented in Washington, DC, to the Assistant Secretary of Indian Affairs, or (2) by January 27, 1997, when it was annotated "REC 1:10 p.m. 1/27/97 Stuart Mani", the application for lease lacks a tribal resolution and therefore it does not constitute a proposal for a self-determination contract which must be acted upon by the Secretary.

9. In light of the decision as expressed in paragraph 4, above, the seventh paragraph of the final agency decision of April 7, 1997, becomes controlling. The more substantive and substantial reasons stated in its paragraph two become excess.

Additional Comments

10. It should be noted that in the course of the telephonic prehearing conference, the attorneys for the Appellant and Appellee made specific comment to the undersigned that they both wished a thoughtful and deliberative decision as to the case itself and for the benefit of the cooperative relationship between their respective clients. The compelling but limited basis for the recommended decision as stated above obviously short circuits their desire for a more substantive decision on the interplay between the ISDEA, supra, and the Tribally Controlled School Grants Act (1988), Public Law 100-297, as amended, and now codified at 25 U.S.C. 2501-2511 ("TCSGA"). Consequently I feel it appropriate to add the following comments on several of the issues raised by the parties, but as dictum and not the law of the case.

11. The ISDEA of 1975, as amended in 1994 and amplified by departmental regulations in 1996, needs to be read in harmony with the TGSCA of 1988. Mindful of the cooperation between tribes and the federal government as clearly mandated by the Congress and by the Secretary of the Interior in ISDEA and its regulations, I find it required that the two acts be construed, whenever possible, in a manner helpful to Indian people and to tribal goals as viewed from the Indian perspective. In the context here of the funding sought in the application for lease, the only significant impediment to harmonious reading of the two acts would be in trying to uphold double funding for the "same expenses", which must be precluded. 25 U.S.C. 2508(c). I do not view the fact of the Hannahville Indian School historically being operated under TCSGA and its grant funding as a conflicting impediment to the enhancement of its buildings under ISDEA, as amended. Specifically, the receipt of annual TCSGA operation and maintenance (O&M) funds for the older part of the building is clearly severable from construction-lease funding under ISDEA for the newer part. There is a substantial difference in the nature of O&M funding versus construction funding in federal fiscal law and practice, each with fencing rules precluding using one type of money for the other purpose. While these legal differences are generally argued to prevent a contract action from occurring, here the same logic would instead allow the Appellant's position to prevail. Taking this conclusion an analytical step further, the dual source prohibition argument, alone, would not trigger a successful 25 U.S.C. 45Of(2)(e) defense (i.e., "cannot be lawfully carried out by the contractor"), as claimed in the Appellee's declination letter.

12. But by the same reference to federal fiscal law principles, the ISDEA and its 1996 regulations cannot be viewed as an open wallet. No federal funding can be anticipated in advance of a congressional appropriation pursuant to the Antideficiency Act, 31 U.S.C. 1341; and the BIA cannot approve an ISDEA application, a "638 contract", or other funding request for which funding is not appropriated as to purpose, 31 U.S.C. 1301. To the extent that the Department did not have suitable funding available which could lawfully be utilized for the requested Hannahville School lease, it properly asserts the 450f(2)(e) provision as an absolute impediment to awarding the contract. That is a fact question which need not be resolved at this time, in light of the specific ruling in paragraph 4, above.

13. The alleged mishandling of the application for lease after its presentation to the Assistant Secretary for Indian Affairs in Washington is also rendered moot by the controlling finding, paragraph 4 above. The record submitted and considered leaves the impression that the matter was a "fumble" and nothing more, falling into the category of excusable neglect at worst; and that either party to this case, but especially the Appellant, might have done better at noticing it earlier and recovering it. There are safeguards and interim steps contained in 25 C.F.R., Part 900, which would have probably revealed a problem earlier in the 90-day period, had either party been aggressive in monitoring it. Greater fact-finding could have been done on this issue in this case, for example, as to what happened to the companion Lac Courte Oreilles application in its 90-day journey to declination. But such was not the desire of either party, and in light of the principal finding herein is not necessary at this time.

14. But the "fumbled" application raises an interesting question of what specific act or action constitutes the filing of such an ISDEA application, so as to start the BIA's 90-day clock running. The 1996 ISDEA regulation, 25 C.F.R. Part 900, effective August 23, 1996, which attempts to be user-friendly and comprehensive, does not state where an application should be filed; and so it does not provide a "bright line" against which this question could have been adjudged. While presenting it to the Assistant Secretary may have seemed the best way, in retrospect it may have been the worst. The regulation needs to be amended and clarified in this respect, for the benefit of these and future parties.

15. The requested 20-year lease obligation would have been violative of the Antideficiency Act, supra, as to its length, but is probably a matter that could have been amended and cured in the application's discussion process of 25 C.F.R., Part 900, had the application been actively worked by the parties.

16. The final interesting issue is that raised by the Appellee in its illegality argument: the inclusion of ISDEA's section 450j(f), "Use of existing school buildings, ... ", versus the non-inclusion of 450j(l){small L}, "Lease of facility used for administration and delivery of services", within TGSCA's section 2508(a). The latter section, as published in U.S.C.A., states:

sec.2508. Application with respect to Indian Self-Determination and Education Act
(a) Certain pro visions to apply to grants

All provisions of sections 5, 6, 7, 104, 105(l), 106(f) ,109, and 111 of the Indian Self-Determination and Education Assistance Act [25 U.S.C.A. sections 450c, 450d, 450e, 450i, 450j(1), 450j-1(f), 450(m), and 450(n)], except those provisions relating to indirect costs and length of contract, shall apply to grants provided under this chapter.

If I understand it correctly, Appellee argues that the use of existing school buildings is thus permitted in ISDEA, but lease of facilities is not. This is a subject matter approach, with one category included and one excluded. However I find that by a reading of the eight included provisions together, all seem to be process- or procedure-oriented, and therefore to be an incorporation by reference of procedural aspects to be used in administering ISDEA programs. This conclusion is consistent with the general language used in subsection 2508(a), most notably, "All provisions . . . shall apply to grants . . . ." I therefore do not read these eight to be subject matter specific or to be a list of what items are appropriate for ISDEA treatment and what items are not. But this is a dictum, perhaps obiter.

Conclusion

17. For the reasons stated in paragraphs 4 through 9 above, the Appeal is DENIED.

18. T he parties shall bear their own costs and attorneys fees.

Appeal. Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Interior Board of Indian Appeals (IBIA) under 25 CFR 900.165(c). An appeal to the IBIA shall be filed at the following address: Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies ofyour notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party filesan objection to the recommended decision within 30 days, the recommended decision will become final

St. Paul, Minnesota

//original signed
William S. Herbert
Administrative Law Judge